

A **DAMIEN THANAM DIVEAN v. CSC MALAYSIA SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR
SU GEOK YIAM J
[JUDICIAL REVIEW NO: 25-35-02-2015]
20 MAY 2016

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ADMINISTRATIVE LAW: Judicial review – Certiorari – Application to quash award of Industrial Court – Chain of events leading to dismissal of employee – Issuance of warning letters after employee chaired union meeting – Change in employee’s designation – Whether done with ulterior motive – Whether employee’s dismissal from employment done with just cause and excuse – Whether proper case warranting judicial review intervention

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LABOUR LAW: Dismissal – Misconduct – Chain of events leading to dismissal of employee – Issuance of warning letters after employee chaired union meeting – Change in employee’s designation – Whether done with ulterior motive – Whether employee’s dismissal from employment done with just cause and excuse – Whether proper case warranting judicial review intervention

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The applicant commenced employment with the respondent as a customer support analyst. A meeting was held between the representatives of the employees of the respondent who was led, amongst others, by the applicant. The meeting was held in order to resolve employees’ work related problems and also on the formation of the National Union of Commercial Workers (‘Union’). The Vice-President of Human Resources for the respondent, however, was not in favour of the formation of the Union. Subsequently, the applicant received a first show cause letter with the allegations of late comings backdated from 4 December 2009 to 6 April 2010. Thereafter, the applicant, upon responding to the first show cause letter, was given a first warning letter. The applicant was then redesignated as an executive. However, all other terms and conditions of employment, including the salary, remained the same. The applicant further received a second warning letter and a final warning letter without any prior show cause letter. After a domestic inquiry, the applicant was dismissed by the respondent. Aggrieved with his dismissal, the applicant filed an action against the respondent for wrongful dismissal at the Industrial Court. The applicant argued that the applicant’s dismissal was tainted with ulterior motive and an attempt by the respondent to prevent the formation of the Union. The respondent on the other hand, justified that the applicant’s change in job function was done due to global initiative of the respondent to align employees to the global structure. The Industrial Court held that the applicant’s dismissal was done with just cause and excuse and dismissed the applicant’s claim. Therefore, the applicant filed for a judicial review of the Industrial Court’s decision and sought, *inter alia*, for an order of *certiorari* to quash the decision of the Industrial Court.

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Held (granting order of *certiorari* against decision of Industrial Court)

- (1) The Industrial Court failed to take into account, *inter alia*, (i) the evidence adduced by the applicant before the Industrial Court that this was a case of union busting; (ii) it was only after the applicant chaired the meeting for Union that the respondent started to send the applicant the show cause letters and the warning letters for late comings; (iii) the change to the applicant's job title was made in order to disqualify him from being eligible to be a member of the Union because only the applicant's job title was changed but all his duties and responsibilities remained the same; and (iv) the respondent failed to provide evidence of the applicant's late comings and the reliance by the respondent on the applicant's admission of his late comings was insufficient to enable the respondent to discharge its burden of proof. (para 29)
- (2) The first to the third written warnings and the final warning were fabricated by the respondent in order to give the impression to the panel of the domestic inquiry that the respondent had complied with the procedure as set out in the disciplinary guidelines. No verbal warning was given to the applicant and the applicant received the second and third warning letters without being given an opportunity to explain. Further, the increment given to the applicant after the first warning was not given *bona fide* but with an ulterior motive as it was given with the intention to pull the wool over the eyes of the panel of the domestic inquiry and also the Industrial Court and to delude them into believing that the respondent had acted and would act fairly towards the applicant without any ill-intention or malice. (para 29)
- (3) The chain of events that ultimately led to the applicant's sacking was deliberately engineered and started by the respondent motivated solely by its dislike for the active role that was played by the applicant in the formation of the Union. In the circumstances, the Industrial Court had erred in law in coming to its decision that the respondent had proved the misconduct of the applicant on the balance of probabilities and that the applicant's dismissal was with just cause and excuse. (para 29)

Case(s) referred to:

Alam Venture Sdn Bhd & Anor v. Abdul Aziz Abdul Majid & Ors [2015] 5 CLJ 1 FC (refd)

Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KB 223 (refd)

Council of Civil Service Unions v. Minister For The Civil Service [1985] AC 374 (refd)

Goon Kwee Phoy v. J&P Coats (M) Bhd [1981] 1 LNS 30 FC (refd)

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC (refd)

Hong Leong Bank Bhd v. Phung Tze Thiam [2008] 4 CLJ 742 CA (refd)

Hotel Jaya Puri Bhd v. National Union Of Hotel, Bar & Restaurant Workers & Anor [1979] 1 LNS 32 HC (refd)

Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 FC (refd)

- A *Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2013] 9 CLJ 409 FC (*refd*)
R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC (*refd*)
Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Another Appeal [1995] 3 CLJ 344 FC (*refd*)

Legislation referred to:

- B Evidence Act 1950, s. 114(g)
Industrial Relations Act 1967, ss. 9(2), 20(3), 30(5), (6), Second Schedule Item 5
Rules of Court 2012, O. 53 r. 3(2), O. 59 r. 7(4), O. 92 r. 4
For the applicant - Mohan Ramaasaamy; M/s Ram Mo Assocs
For the respondent - R Ravindra Kumar; M/s Raja Darryl & Loh
- C *Reported by Sandra Gabriel*

JUDGMENT

Su Geok Yiam J:

D Enclosure (1)

- [1] Enclosure (1) is the notice of application of Damien Thanam Divean (“the applicant”), which was filed on 17 February 2016, pursuant to O. 53 r. 3(2) of the Rules of Court 2012 (“RC 2012”) against his former employer, namely, CSC Malaysia Sdn Bhd (Company No. 25110-P) (“the respondent”),
E for leave to file for judicial review of the decision of the Industrial Court dated 13 November 2014.

[2] In the event leave is granted, the applicant seeks the following reliefs from the court in his substantive application:

- F (a) An order of *certiorari* to quash the decision of the Industrial Court that is contained in its Award No. 1266 of 2914 dated 13 November 2014, which ruled that the respondent has proved the misconduct of the applicant on the balance of probabilities and that the dismissal of the applicant by the respondent was with just cause and excuse; and
G (b) An order for the applicant’s reinstatement.

Cause Papers For The Leave Application

[3] Together with his notice of application, encl. (1), the applicant filed the following cause papers for the leave application:

- H (i) Applicant’s statement under O. 53 r. 3(2) of the RC 2012, encl. (2);
(ii) Applicant’s affidavit-in-support, encl. (3);
(iii) Applicant’s affidavit-of-service, encl. (4);
I (iv) Applicant’s affidavit-of-service, encl. (5); and
(v) Applicant’s additional affidavit-in-support, encl. (6).

Leave Granted To File For Judicial Review

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[4] On 5 May 2015, Asmabi binti Mohamad J (now JCA) granted leave to the applicant to file for judicial review of the decision of the Industrial Court dated 13 November 2014, with cost-in-the-cause.

Cause Papers For The Substantive Application

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[5] The applicant and respondent then filed the following cause papers for the substantive application for judicial review:

- (a) Order of Asmabi binti Mohamad J (now JCA) dated 5 May 2016, encl. (8);
- (b) Applicant's notice of hearing of application for judicial review, encl. (9);
- (c) Respondent's affidavit-in-reply, encl. (11);
- (d) Applicant's affidavit-in-reply, encl. (12);
- (e) Applicant's affidavit-in-support, encl. (13);
- (f) Respondent's written submissions, encl. (15);
- (g) Respondent's bundle of authorities, encl. (16);
- (h) Applicant's written submissions, encl. (17);
- (i) Applicant's bundle of authorities, encl. (18);
- (j) Respondent's submissions-in-reply, encl. (20);
- (k) Respondent's bundle of authorities, encl. (19); and
- (l) Applicant's written submissions-in-reply, encl. (21).

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Background

[6] The background of encl. (1) is as follows:

By a letter of appointment dated 17 June 2004, the applicant commenced employment with the respondent on 14 June 2004, as a customer support analyst;

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On 24 January 2011, the applicant was dismissed by the respondent;

At the time of the applicant's dismissal, the applicant's last drawn salary was RM3,327 with a fixed shift allowance of RM500 per month;

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Prior to his dismissal by the respondent, the applicant had served the respondent for a period of approximately six years;

During this period, the respondent has never issued any verbal or written warning to the applicant on the applicant's behaviour or work performance;

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- A On 25 February 2010, a meeting was held between the representatives of the employees, totalling three, who were led by the applicant, and the representatives of the respondent;
- B The meeting was held in order to resolve the employees' work-related problems and also on the formation of the National Union of Commercial Workers ("NUCW") and this meeting was minuted by the respondent;
- C During the meeting, the Vice-President of Human Resources for the respondent, informed the attendees at the meeting that there are various channels in the company for the staff to air their grievances and concerns, seek clarifications on areas that they are unclear about and that there is no necessity for a union formation, as the respondent believes in an open policy;
- D Subsequently, on 12 April 2010, the applicant received the first show cause letter with the allegations of "late comings" backdated from 4 December 2009 to 6 April 2010 (see show cause letter – pp. 42-43 "afidavit sokongan");
- E The applicant replied to the show cause letter *vide* his letter dated 15 April 2010 but he was given the first warning *vide* letter dated 23 April 2014 ("first warning letter") (see applicant's explanation letter – pp. 44-45 "afidavit sokongan" and first warning letter – pp. 46-47 "afidavit sokongan");
- F On 7 May 2010, NUCW sought recognition from the respondent pursuant to s. 9(2) of the Industrial Relations Act 1967;
- G However, the respondent *vide* letter dated 20 May 2010 refused to accord recognition to NUCW;
- On 28 June 2010, the Industrial Relations Department under the Ministry of Human Resources requested the respondent to submit proof of receipt of NUCW's application (Form A) seeking recognition pursuant to s. 9(2) of the Industrial Relations Act 1967;
- H On 1 July 2010, the applicant was given a salary increment by the respondent, which was based on the annual salary review exercise;
- I On 19 August 2010, the Union Affairs Department under the Ministry of Human Resources informed the respondent that an official/ investigatory visit will be made to the respondent's office on 2 September 2010 to check on records on the issue of recognition sought by NUCW;

On 25 August 2010, the respondent requested the Union Affairs Department under the Ministry of Human Resources to postpone the investigatory visit scheduled on 2 September 2010 to 7 September 2010 because the respondent's Head of Human Resources needed to attend a meeting on 2 September 2010;

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All of a sudden, the applicant was redesignated as an executive *vide* a letter dated 26 August 2010 without stating the effective date but stating that all the other terms and conditions of employment, including the salary, remained the same;

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On 26 August 2010, the Union Affairs Department under the Ministry of Human Resources granted the respondent's request for a postponement and informed the respondent that the investigatory visit on 2 September 2010 was deferred to 7 September 2010;

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On 26 August 2010, the applicant received the second warning letter for late comings without any prior show cause letter and without being given an opportunity to explain;

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On 1 October 2010, the applicant received a final warning letter for late comings without any prior show cause letter and without being given an opportunity to explain;

Subsequently, the Union Affairs Department under the Ministry of Human Resources informed the respondent *vide* a letter dated 11 October 2010 that NUCW is the competent union to represent the respondent's employees;

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On 20 October 2010, the Ministry of Human Resources informed the respondent that they wished to conduct a membership count/ investigation for the purpose of recognition of NUCW (see letter dated 11 October 2010 – p. 68 and letter dated 20 October 2010 – pp. 69-70);

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On 1 December 2010, the applicant received a letter from the respondent seeking an explanation for his late comings and he replied on 3 December 2010 (see letter dated 1 December 2010 – pp. 73-74 “afidavit sokongan” and letter dated 3 December 2010 – pp. 75-77 “afidavit sokongan”);

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On 3 December 2010, the applicant received from the respondent a notice of suspension and notice of domestic inquiry, and on 14 December 2010 he received a further notice of extension of suspension and notice of the rescheduling of the domestic inquiry (see letter dated 3 December 2010 – pp. 73-74 “afidavit sokongan” and letter dated 14 December 2010 – pp. 75-77 “afidavit sokongan”);

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The domestic inquiry was conducted on 7 January 2011 and the panel report was prepared on 17 January 2011, and the applicant was dismissed *vide* a letter dated 17 January 2011 (see notes of domestic

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A inquiry – pp. 97-118 “afidavit sokongan”, panel report – pp. 120-123 “afidavit sokongan” and dismissal letter – pp. 124-125 “afidavit sokongan”);

B Being aggrieved with his dismissal by his employer, the applicant lodged a complaint with the Minister for Human Resources; and

Somewhere around September 2014, during the submissions of the parties at the Industrial Court, the parties were informed that the recognition issue concerning NUCW was still unresolved and that it was pending at the High Court.

C **Decision Of The Industrial Court**

[7] On 13 November 2014, the Industrial Court Chairman dismissed the applicant’s claim against the respondent for wrongful dismissal. In her decision, the learned Chairman, stated, *inter alia*, the following reasons for her decision:

D a) The Court has considered the totality of the evidence adduced before this court and is satisfied that the company has proved the misconduct of the Applicant on a balance of Probabilities. [Paragraph 35 - Award]

E b) It is court’s findings that the Applicant had not denied or challenged any log in times there and then in that document. [Paragraph 23 - Award]

F c) The Applicant’s nature of job and the nature of the Respondent’s business demanded the punctuality and prompt service of employees like the Claimant or it would affect the reputation of the Company. [Paragraphs 36 & 37 - Award]

G d) The Court finds that the compensation for the loss of time was not an arrangement between the Applicant and Respondent. If there was, it was merely, Mr Remyjit Singh who was no longer his immediate superior/supervisor for the period the Applicant had continued to be late for work. Despite the Applicant’s claims that it was acceptable for him to replace for the lost time and he had done that, the Claimant had failed to adduce any documentary evidence to the effect. [Paragraph 39 - Award]

H e) The Respondent had not victimised the Claimant on his salary increment despite the various actions taken against him on his tardiness. [Paragraph 28 - Award]

I f) The Applicant was also counselled by COW-1 that he could not take extra break without prior approval and on 9 October 2010, the Applicant was counselled that he had exceeded his sick leave and that he would have to take unpaid leave for the rest of the year. [Paragraph 30 - Award]

- g) COW-1 and COW-2 definitely did not approve of the Applicant's late for work from December 2009 to November 2010." [Paragraph 39 - Award] A

Reason Given By The Respondent For The Change In The Job Description Of The Applicant

[8] Before the Industrial Court and before this court, the respondent has given the following justification for the change in the applicant's job description: B

- (a) There was no ulterior motive on the part of the respondent when the applicant's job title was changed whilst all the terms and conditions of his employment remained unchanged because it was done due to a global initiative of the respondent to align employees to the global job structure. C

Reasons Given By The Respondent For The Applicant's Dismissal

[9] Before the Industrial Court and before this court, the respondent has given the following justifications for the dismissal of the applicant: D

The applicant's lateness in reporting for work which is not less than 14 occasions from 4 December 2009 to 6 April 2010;

This is a serious misconduct as it affected the respondent's ability to answer the calls from the respondent's customers, promptly, and it also affected the respondent's business; E

The applicant replied to the first show cause letter *vide* his letter dated 15 April 2010, in which he stated that the reason for his late comings was due to the traffic congestion; F

However, this reason was unacceptable to the respondent and the applicant's persistent lateness continued despite the issuance of the second warning letter;

In the final warning letter, the respondent had warned the applicant that action, including termination of employment, would be proceeded with against the applicant, if the applicant repeated the misconduct; G

Nevertheless, the applicant's misconduct persisted and he continued to give the same excuse of traffic congestion and also other excuses such as flash floods and car problems; H

Subsequently, the applicant was suspended and a domestic inquiry was held; and

After the panel for the domestic inquiry had produced its report, the respondent sacked the applicant for his serious misconduct due to his 25 late comings. I

A Respondent's Submissions

[10] The respondent submitted that the applicant's application for judicial review has no merit and ought to be dismissed with cost based on the following reasons:

- B** (a) Based on the reasons as set out above, the termination of the applicant's employment is just and the issue of union busting, that was raised by the applicant, is merely the applicant's attempt to divert the court's attention;
- C** (b) The Industrial Court did not err in law and/or fact and it had decided, correctly, the applicant's complaint based on the balance of probabilities after considering all the relevant factors;
- (c) The Chairman of the Industrial Court has considered the following principles of law and/or the facts before arriving at her decision to dismiss the applicant's complaint against the respondent for unjust dismissal:
- D**

There is no letter from the applicant to challenge the contents of the warning and show cause letters that were issued to him;

- E** The applicant admitted his late comings during the cross-examination and, hence, there is no necessity for the respondent to prove them by producing the coach logs;

- F** The applicant has not denied any of the log in times and, hence, the adverse presumption in s. 114(g) of the Evidence Act 1950 should not be invoked against the respondent for not producing the coach logs for the applicant's 24 late comings for work;

No proof was adduced by the applicant to support his averments that his late comings were due to the earlier shift worker being still at work or that his late comings had been approved by the leader;

- G** The applicant was misleading the Industrial Court by, on the one hand, contending that his reasons for his late comings were rejected by the respondent, but on the other hand, contending that there was no proof adduced by the respondent of his late comings;

- H** The applicant was allowed to replace the same amount of minutes corresponding to how late he was on the days concerned, but this allowance by the respondent is not tantamount to the respondent condoning the applicant's late comings, as evidenced by the warning and show cause letters that were issued to the applicant by the respondent;

- I** The applicant's averment that the warning letters were issued four months after the late comings of the applicant was misleading because an isolated and single occasion of late coming would not justify the giving of a show cause letter by the respondent;

Hence, this explained why the respondent had departed from some of the guidelines that are contained in the disciplinary guidelines of the respondent;

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In addition, the applicant did not provide any proof of his replacement of the time that was lost from his late comings;

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The verbal warning was given to the applicant on 9 March 2010 and it was followed by the subsequent warning letters, the letter seeking an explanation, the applicant's suspension, and, thereafter, by the domestic inquiry;

Hence, the absence of the incident report could not be viewed as a factor to treat the applicant's dismissal as an unfair dismissal of the applicant by the respondent;

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The standard of proof for the applicant to prove that the verbal warning and the documents related thereto are false is beyond reasonable doubt but no cogent evidence was provided by the applicant to establish these two matters;

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The applicant had signed on each page of the domestic inquiry notes and, hence, the applicant cannot contend that the allegations against him in the domestic inquiry are invalid;

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The issues raised regarding the COB2 (the verbal warning and the documents related thereto) and the COB3 (the coach logs tracking) are merely afterthoughts and bare allegations without proof as the COB3 (the coach logs tracking) was marked as an exhibit in the domestic inquiry without objection on the applicant's part;

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Not all the coach logs are in the bundle of documents as some had gone missing because the system is not generated;

Furthermore, the coach logs highlighted that the applicant had been counselled many times for exceeding his break time and for exceeding the number of days allocated for his medical leave;

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The applicant's late comings had affected the respondent's business in fulfilling the terms of its contracts with its clients, and, hence, it justifies the dismissal of the applicant; and

The applicant had been given an increment after the issuance of the first show cause letter and the warning letter, and this fact shows that the respondent had not victimised the applicant in dismissing the applicant simply because he had taken an active part in the formation of NUCW.

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A Decision Of The Court On The Substantive Application For Judicial Review

B [11] On 8 March 2016, after having heard Mr. Mohan Ramaasaamy, learned counsel for the applicant, and Mr. R. Ravindra Kumar, learned counsel for the respondent, and after having considered their written submissions and the authorities cited by them in their respective bundles of authorities, for the applicant's substantive application for judicial review, the court agreed with and accepted the submissions of Mr. Mohan Ramaasaamy, learned counsel for the applicant, that the Industrial Court Chairman had made errors of law in arriving at his decision that the applicant's dismissal was with just cause and excuse.

C [12] Hence, the court granted an order of *certiorari* to quash the award.

D [13] After the court was informed by the applicant's learned counsel that due to the long passage of time after the applicant's dismissal, the applicant wished to abandon his prayer for an order of reinstatement and to claim for compensation *in lieu* of reinstatement, the court ordered the respondent to pay to the applicant 24 months back wages for unlawful dismissal and also six months' salary as compensation *in lieu* of reinstatement which are calculated as follows:

E (1) Back wages from the date of dismissal (24 January 2011) to today (8 March 2016) but limited to 24 months as follows:

RM3,827.00 x 24 months = RM91,848.00 less Employee's 11% EPF contributions (RM91,848.00 x 11%) of RM10,103.28 = RM81,744.72.

F (2) Compensation *in lieu* of reinstatement (1 month salary for every completed year of service) for 6 years of service from 14 June 2004 to 24 January 2011 as follows:

RM3,827.00 x 6 months = RM 22,962.00.

G [14] The court also ordered the sums awarded to be subject to tax.

H [15] The court ordered the applicant's oral prayers for the payment of bonus totalling a sum of RM57,405 for five years at three months per year ie, RM3,827 x 3 x 5, the loss of yearly increments totalling a sum of RM12,000 at RM200 for each year for six years and special damages of another 24 months back wages totalling RM91,848 due to the applicant's unlawful dismissal for union busting/victimisation, dismissed.

[16] The court also ordered the respondent to pay to the applicant a sum of RM5,000 as the cost of the application, encl. (1).

I [17] The court further ordered the allocatur certificate to be issued by the Senior Assistant Registrar in accordance with O. 59 r. 7(4) of the RC 2012.

[18] The court finally ordered that the allocatur fee must be paid before a fair copy of the order made by the court on 8 March 2016 can be filed.

Amendment Of The Order Dated 8 March 2016

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[19] On 12 April 2016, before the order dated 8 March 2016 was perfected, the parties appeared before the court in chambers, upon the request of Mr. Mohan Ramaasaamy, learned counsel for the applicant, to seek a review of the order dated 8 March 2016.

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[20] On that date, Mr Mohan Ramaasaamy, learned counsel for the applicant, prayed for an additional order from the court to require the respondent to pay directly to EPF, a sum of RM11,940.24 (RM497.51 x 24 months), being the employer's 13% EPF contributions for the period of 24 months, on the ground that due to an oversight on his part, he had omitted to ask for an order to that effect, even though he had written out his calculations on a piece of paper, the amount of RM497.51 being the employer's 13% monthly EPF contribution for item (ii) of the breakdown of the back wages for the period of 24 months and he had handed over the piece of paper with his calculations to the court on 8 March 2016, encl. (22), to assist the court to calculate the amount of back wages to be paid by the respondent to the applicant.

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[21] Since the court was satisfied that it was a genuine mistake on the part of Mr Mohan Ramaasaamy, the court granted his request pursuant to O. 92 r. 4 of the RC 2012. The court then amended the order of court dated 8 March 2016, accordingly, to require the respondent to pay directly to EPF, a sum of RM11,940.24 (RM497.51 x 24 months), being the employer's 13% EPF contributions for the period of 24 months, to the account of the applicant.

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[22] Being dissatisfied with the decision of the court dated 8 March 2016, as amended by the court on 12 April 2016, the respondent has filed a notice of appeal to the Court of Appeal on 25 March 2016.

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Reasons For The Decision Of The Court

[23] Below are the reasons for the decision of the court.

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The Law

[24] It is trite law that in order to succeed in an application for judicial review, the applicant must show that the Industrial Court had done any of the following:

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- (a) committed an error of law;
- (b) failed to take relevant matters into consideration;
- (c) taken irrelevant matters into consideration; and
- (d) reached a decision so perverse that no reasonable person similarly circumstanced would have reached it.

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- A (See *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; *Harpers Trading (M) Sdn. Bhd. v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159; [1991] 1 MLJ 417; *Council of Civil Service Unions v. Minister For The Civil Service* [1985] AC 374; and *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223).
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[25] The Federal Court in the classic case of *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449 held that the role of the Industrial Court in a reference under s. 20(3) of the Industrial Relations Act 1967 is as follows:

- C The functions of the Industrial Court in dismissal cases on a reference under s. 20 is twofold; first *to determine whether the misconduct complained by the employer has been established and secondly whether the proven misconduct constitutes just cause or excuse for dismissal.* (emphasis added).

- [26] Further, in the classic case of *Goon Kwee Phoy v. J&P Coats (M) Bhd* [1981] 1 LNS 30; [1981] 2 MLJ 129, the principles on the functions of the Industrial Court, where representation is made, were stated as follows by the Federal Court:
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- E Where representations are made and are referred to the Industrial Court for inquiry, it is the duty of the court to determine whether the termination or dismissals with or without just cause or excuse. *If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse.* The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it. *It is indeed trite law that the burden of proof is on the Company to satisfy the court that the dismissal of the employee is with just cause and excuse.* (emphasis added).
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- [27] In the recent Federal Court case of *Alam Venture Sdn Bhd & Anor v. Abdul Aziz Abdul Majid & Ors* [2015] 5 CLJ 1, the Federal Court reiterated the trite principles of judicial review as follows:
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- H It is now settled law that the courts may review the decision of an inferior tribunal on the grounds of illegality, irrationality and possibly proportionality: *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145, thus permitting the courts to scrutinise the decision not only for process but also for substance. In *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625; [2004] 2 MLJ 288 this court however clarified that not every case was amenable to judicial review pursuant to the principle in *R Rama Chandran's* case. It should only be invoked in appropriate cases. There may be cases in which for reasons of public policy, national interest, public safety or national security it may be wholly inappropriate for the courts to attempt any substitution of views: *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11; [1997] 1 MLJ 789.
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[22] A decision of an inferior tribunal is amenable to judicial review where the facts do not support the conclusion arrived at by the tribunal or the findings of the tribunal had been arrived at by taking into consideration irrelevant matters or disregarding relevant matters: *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1.

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[28] The Federal Court in a recent decision in *Norizan Bakar v. Panzana Enterprise Sdn Bhd* [2013] 9 CLJ 409; [2014] 1 MELR 1; [2013] 6 MLRA 613, further affirmed that the doctrine of proportionality applies to cases under s. 20 of the Industrial Relations Act 1967. The Federal Court referred to s. 30(5) and (6) as well as Item 5 of the Second Schedule of the Industrial Relations Act 1967 and held that the doctrine of proportionality of punishment is already inbuilt into the Industrial Relations Act 1967. It said as follows at p. 628:

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[37] Clearly, the reference by the Federal Court in *Milan Auto's* decision to the “two fold” test, especially the second fold where the Industrial Court has to decide whether the proven misconduct constitutes just cause or excuse for the dismissal is clear reference to the duty of the Industrial Court to apply the doctrine of proportionality of punishment. This is consistent to what is required of the Industrial Court under s. 30(6) in making an award which provides:

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(6) In making its award, the court shall not be restricted to the specific relief claimed by the parties or to the demands made by the parties in the course of the trade dispute or in the matter of the reference to it under s. 20(3) but may include in the award any matter or thing which it thinks necessary or expedient for the purpose of settling the trade dispute or the reference to it under s. 20(3).

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[38] Pertinent to note that, under the IRA itself there is an inbuilt mechanism through Item 5 of the Second Schedule to consider the doctrine of proportionality of punishment. Item 5 provides as follows:

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Any relief given shall take into account contributory misconduct of the workman.

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[39] Based on the above, it is clear that the Industrial Court can go on to decide on the relief to be granted by taking into account of contributory misconduct and as such we are of the view that the doctrine of proportionality of punishment is already inbuilt into the IRA. Thus, the Industrial Court can substitute its own view as to what is the appropriate penalty for the employee's misconduct, for the view of the employer concerned.

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[29] Reverting back to the instant case and upon applying the trite principles of judicial review to the facts and circumstances of the instant case, this court found that the Industrial Court had made the following errors of law in coming to its decision that the respondent has proved the misconduct of the applicant on the balance of probabilities and that the dismissal of the applicant by the respondent was with just cause and excuse:

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- A (1) Failure to take into account the following relevant factors:
- (a) The applicant had adduced sufficient evidence before the Industrial Court that this was a case of union busting; and
- (b) The evidence is as follows:
- B (i) It was only after the applicant chaired the meeting for the setting up of the National Union of Commercial Workers (NUCW), that the respondent started to send him the show cause letters and the warning letters for his 25 late comings;
- C (ii) The respondent even changed the applicant's job title from a customer support analyst to an executive, purportedly, due to a global initiative of the respondent to align employees to the global job structure;
- D (iii) But in reality, it was made in order to disqualify him from being eligible to be a member of the NUCW because only the applicant's job title was changed but all his duties and responsibilities remained the same;
- (iv) The respondent to date also refused to give recognition to NUCW on the ground that NUCW is not a competent union to represent the employees of the respondent;
- E (v) A notice of suspension from work was issued to the applicant and it was followed by a domestic inquiry notice;
- (vi) As for the applicant's alleged 25 late comings, the respondent failed to provide evidence with regard to them and the reliance by the respondent on the applicant's admission of his late comings is insufficient to enable the respondent to discharge its burden of proof;
- F (vii) The applicant could not report for work on time because the earlier shift worker was still occupying the working place;
- G (viii) The applicant had given valid reasons for his alleged late comings that were supported with documentary proof (eg, pictures of road block and traffic congestion) but the Human Resources Director of the respondent concluded that his evidence was unacceptable merely because the respondent did not have the expertise to verify the authenticity of those pictures;
- H (ix) According to the disciplinary guidelines, the verbal warning (contained in the COB 2), the first to the third written warnings and the final warning should have been given to the applicant;
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- (x) However, the verbal warning, the first to the third written warnings and the final warning were fabricated by the respondent in order to give the impression to the panel of the domestic inquiry that the respondent had complied with the procedure as set out in the disciplinary guidelines; A
- (xi) In fact, no verbal warning was given to the applicant and the applicant received the second and third warning letters without being given an opportunity to explain; B
- (xii) Based on the facts and circumstances of the instant case, although the applicant was given an increment after his first warning letter, this court was satisfied that the increment given was not given *bona fide* but with an ulterior motive as it was given with the intention to pull the wool over the eyes of the panel of the domestic inquiry and also the Industrial Court Chairman and to delude them into believing that the respondent had acted and would act fairly towards the applicant without any ill-intention or malice; and C D
- (xiii) The fact that the applicant was, thereafter, sacked *vide* the letter of termination dated 17 January 2011, based on the report of the panel dated the same day ie, 17 January 2010, which found the applicant guilty of misconduct, goes to show that the chain of events that ultimately led to the applicant's sacking was deliberately engineered and started by the respondent motivated solely by its dislike for the active role that was played by the applicant in the formation of the union ie, NUCW. E F
- (c) In arriving at its decision, the Industrial Court had failed to consider the following principles of law and/or the facts: F
- (i) The allegations against the applicant in the domestic inquiry are not valid because the respondent did not produce the documentary evidence ie, the coach logs for the charges against the applicant for all his 25 alleged late comings; G
- (ii) The findings in the domestic inquiry are not binding upon the Industrial Court and the respondent bears the burden of producing the necessary evidence ie, the documentary proof of the applicant's late comings, in the Industrial Court because the hearing before the Industrial Court is a re-hearing; H
- (iii) Had the coach logs been produced before the Industrial Court, they would have shown that at the material time, the compensation for loss of time was still practised by the current leader of the applicant and the applicant's late comings were allowed by the leader; I

- A (iv) This is because any dispute or instruction or warning against the applicant or any other staff of the respondent would be shown in the coach logs;
- B (v) However, the coach logs that were produced by the respondent revealed only one late coming of the applicant and the balance 24 late comings were not recorded in the coach logs;
- C (vi) According to the disciplinary guidelines, the penyelia (COW1) and the Ketua Jabatan (COW2) must make an incident report within 24 hours against the applicant for each of his late comings to the Human Resources Department and the warning must be given to the applicant within four days of the alleged late coming;
- (vii) However, COW1 and COW2 failed to comply with these guidelines;
- D (viii) On top of that, the respondent only issued the first warning to the applicant a good four months after his alleged late comings without giving any valid reason for doing so;
- (ix) Hence, this is purely an act of condonation on the respondent's part of the applicant's alleged late comings;
- E (x) For the past six years, prior to the applicant chairing the meeting for the formation of NUCW, the applicant did not receive any warning letter;
- F (xi) The allegation that the applicant had taken medical leave that exceeded his sick leave entitlement and the allegation that he had also exceeded the break time were not pleaded in the respondent's pleadings before the Industrial Court; and
- G (xii) The punishment of dismissal that was meted out to the applicant was, in any event, totally out of proportion to the alleged misconduct of the applicant because the respondent did not give any reason as to why a lesser punishment, which was available, could not be meted out to the applicant.
- H (d) Had the learned Industrial Court Chairman taken into consideration the relevant factors as set out above, she would have arrived at the following conclusion:
- I (i) that although the applicant had a habit of coming late to work, the respondent did not take any action against him because at the material time the respondent had in place a policy or prevailing practice, which allowed the employee to replace the time that was lost from the late comings with additional time put in by the employee during the lunch break;

- (ii) that it was because of this policy or prevailing practice that explained why when the applicant was late for work, the applicant even took pictures to show to his leader that he had a good reason for his late coming in order to avoid being punished by his leader; A
- (iii) that, therefore, the defence of condonation is applicable; B
- (iv) that the three warning letters were only given to the applicant after he was involved in a meeting with the employer in his capacity as a representative of the employees, who were members of a union i.e. NUCW, concerning staff grievances; C
- (v) that the punishment of dismissal was, in any event, excessive, harsh and disproportionate to the alleged misconduct of the applicant; and
- (vi) that, therefore, the applicant's dismissal was primarily a case of union busting/victimisation and that it was done with malice by the respondent because until the date of the hearing of the applicant's complaint before the Industrial Court the union ie, NUCW, has not been registered. D

[30] The court did not grant the applicant's oral prayer for the payment of bonus for five years at three months per year ie, RM3,827 x 3 x 5, totalling a sum of RM57,405. This is because this court agreed with and accepted the submission of Mr R Ravindra Kumar, learned counsel for the respondent, that the payment of bonus is discretionary and is based on the company's net profit and the employee's performance. E

[31] The court did not grant the applicant's oral prayer for the payment of a sum of RM12,000 for the loss of yearly increments at RM200 for each year for six years. This is because this court agreed with and accepted the submission of Mr R Ravindra Kumar, learned counsel for the respondent, that the applicant's employment contract does not provide for increments. F

[32] The court did not grant the applicant's oral prayer for the payment of a sum of RM91,848 being 24 months salary as compensation *in lieu* of reinstatement. This is because this court agreed with and accepted the submission of Mr R Ravindra Kumar, learned counsel for the respondent, that at the most, only a sum of RM22,962 being six months salary at RM3,827 per month could be allowed by the court (see *Hong Leong Bank Bhd v. Phung Tze Thiam* [2008] 4 CLJ 742; [2008] 2 MLJ 785, 792, 796). G H

[33] The court did not grant the applicant's oral prayer for the payment of a sum of RM91,848 being another 24 months back wages at RM3,827 per month being special damages for the applicant's dismissal due to union busting/victimisation. This is because this court agreed with and accepted I

A the submission of Mr R Ravindra Kumar, learned counsel for the respondent, that no authority was cited by Mr Mohan Ramaasaamy, the applicant's learned counsel, to support the applicant's claim for this item of loss.

B [34] Mr R Ravindra Kumar, learned counsel for the respondent, had submitted that there ought to be a deduction from the 24 months back wages for the applicant's contributory misconduct. He cited *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn. Bhd. & Another Appeal* [1995] 3 CLJ 344 in support of his submission. However, the court rejected his submission because the court agreed with and accepted the submission of Mr Mohan Ramaasaamy, learned counsel for the applicant, that the respondent had failed to prove on a balance of probabilities that the applicant was guilty of any misconduct based on the reasons as stated in this judgment.

C [35] Mr R Ravindra Kumar, learned counsel for the respondent, also submitted that this court ought to reduce the sums awarded by 10% to 20% for a post-dismissal workman who is gainfully employed. He cited *Hotel Jaya Puri Bhd v. National Union Of Hotel, Bar & Restaurant Workers & Anor* [1979] 1 LNS 32; [1980] 1 MLJ 109 in support of his submission. However, the court rejected his submission because the evidence that the applicant was gainfully employed came solely from the applicant and the evidence did not show how much income that the applicant had received post his dismissal.

E Hence, the court was not able to make the deduction.

Conclusion

F [36] In the premises, the court was satisfied that the decision of the Industrial Court was perverse, and consequently, the court granted an order of *certiorari* to quash the award of the Industrial Court.

G [37] The court ordered the respondent to pay a sum of RM81,744.72 being 24 months back wages to the applicant, after making the necessary deduction for income tax, which the respondent has to pay directly to the Income Tax Department, to the account of the applicant, a sum of RM11,940.24 being the employer's 13% EPF contributions, directly to the EPF and a sum of RM10,103.28 being the employee's 11% EPF contributions, directly to the EPF, to the account of the applicant, for his unfair dismissal and a sum of RM22,962 being six months salary as compensation *in lieu* of reinstatement, after making the necessary deduction for income tax, which the respondent has to pay directly to the Income Tax Department, to the account of the applicant; and cost of RM5,000.

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